COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops	D.T.E. 03-59

RESPONSE OF VERIZON MASSACHUSETTS TO THE OFFER OF PROOF FILED BY DSCI CORPORATION AND INFOHIGHWAY COMMUNICATIONS

As the Department is aware, the Federal Communications Commission ("FCC") has concluded that "competitors are not impaired with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above." ("enterprise switching"). *Triennial Review Order* ¶ 451. The FCC made this "national finding" because there are "few barriers to deploying competitive switches to service customers in the enterprise market at the DS1 capacity and above . . . ." *Id.*

The FCC has given state commissions 90 days from the effective date of the FCC's *Triennial Review Order* to petition the FCC to "waive" this national determination for a particular geographic market. *Id.* ¶ 455. A state commission that wishes to do so must make "an affirmative finding" demonstrating impairment for enterprise switching and can do so only by applying the specific and mandatory criteria set forth by the FCC. *Id.* ¶¶ 456-57.

Given the Department's limited resources, together with the extensive tasks that it has been assigned as part of the FCC's *Triennial Review Order*, the Department does not have the luxury of conducting a 90-day proceeding merely because a carrier requests one. For this reason, the Department has required CLECs that contend that there is impairment in the enterprise switching market to come forward with an offer of proof.[1] Only two CLECs have even attempted to provide such an offer. However, the "offer of proof" of these two carriers – DSCI Corporation ("DSCI") and InfoHighway Communications Corporation ("InfoHighway") – falls well short of demonstrating that the Department needs to gather further evidence, much less that impairment for enterprise switching exists. Instead of offering relevant facts, these carriers have served up irrelevant theories and opinions. Instead of addressing the relevant waiver issue, these carriers seek "waivers" that the Department cannot grant. And instead of addressing the mandatory standards set forth by the FCC, these carriers ask the Department to disregard these standards.

Simply put, DSCI and InfoHighway have failed to offer any evidence to show that a CLEC that wishes to enter the local exchange service market for enterprise customers would suffer any "operational or economic impairment" in the absence of unbundled switching. *See Triennial Review Order* ¶ 451. Verizon Massachusetts ("Verizon MA") therefore respectfully requests that the Department close this proceeding without further action.

[1] Tr. 9/25/03 at 9-10.

ARGUMENT

I. DSCI AND INFOHIGHWAY'S OFFER OF PROOF FAILS TO PROVIDE EVIDENCE THAT ADDRESSES THE FCC'S IMPAIRMENT CRITERIA

DSCI and InfoHighway have made no factual showing regarding the FCC's mandatory operational criteria. In order to rebut the FCC's finding of no impairment for enterprise switching, the Department must determine whether specific "operational factors" are impairing competitors from deploying their own switches for use serving the enterprise customer market. *Triennial Review Order* ¶ 456; 47 CFR 51.319(d)(3)(i). These factors are whether entrants as a whole have been subjected to difficulties in obtaining: (1) standalone loops; (2) collocation space; or (3) cross-connects. *Id.*

DSCI and InfoHighway have failed to provide any evidence on any of these relevant operational factors. They raise no issue with Verizon MA's specific performance in provisioning loops in Massachusetts (which is excellent). They do not allege difficulties in obtaining collocation space due to lack of space or delays in provisioning by Verizon MA (which they would not be able to demonstrate). They do not allege difficulties in obtaining cross-connects in any Verizon MA wire center. Instead, these CLECs complain about the provisioning of the UNE-P arrangements for high capacity loops. *Joint Offer of Proof* at 9. However, these contentions, even if accurate, have no bearing on the question of whether carriers are impaired in deploying their own switches to serve enterprise customers.

The relevant provisioning issue for purposes of this proceeding concerns Verizon MA's provisioning of standalone loops to be used with CLEC switches, *i.e.* UNE-L, not the provisioning of UNE-P arrangements used to serve enterprise customers. DSCI and InfoHighway's argument appears to be that because they claim to have difficulty in obtaining something to which they are not entitled, this difficulty somehow entitles them to it. This circular argument borders on the frivolous. Whether DSCI's and InfoHighway's claims about Verizon MA's provisioning of high capacity UNE-P arrangements are accurate or not, they say nothing about the availability of the high capacity loops that CLECs use in conjunction with their own switches in this market. The fact remains that other CLECs currently use more than 5,000 DS1 standalone loops in conjunction with switches other than those that belong to Verizon MA.[2]

The only other operational issue these carriers raise has to do with hot cuts and enterprise switching. DSCI and InfoHighway trumpet that Verizon MA "has conceded" that it has not established a hot cut process for migrating a DS1 customer from Verizon's network to a CLEC's network. *Joint Offer of Proof* at 11. But this is no more a "concession" than it would be for Verizon MA to "concede" that the Earth is round. As these CLECs are well aware, a "hot cut" is not needed to transfer service of a DS1 loop from Verizon MA to a CLEC. A "hot cut" is the near-simultaneous disconnect of a working loop from a switch and the reconnecting of that loop to a different switch. But as the FCC has pointed out, "the conversion process for enterprise customers generally involves the initiation of service to the competitor's new digital loop while the

2 Of particular interest is that several carriers filed comments in this case stating that they provide switching services for enterprise customer and want DSCI's and InfoHighway's business. *See* comments of Lightship Telecom (filed October 24, 2003) and Paetec Communications (filed October 21, 2003). The fact that other carriers are posed to provide switching in this market belies any claim of impairment.

incumbent's service remains in place." *Triennial Review Order* ¶ 451. That is why there is no "hot cut" process for enterprise switching. And it is why the FCC concluded that this conversion process for enterprise customers "obviates the need for hot cuts at the incumbent LEC's central office." *Id.*. Contrary to being some kind of defect, this conversion process for enterprise customers eliminates what the FCC considers to be "a significant source of impairment."[3] *Id.* Thus these carriers have pointed to nothing in the normal provisioning process for standalone DS1 loops attached to a CLEC switch that indicates any operational impairment. To the extent the carriers are concerned not with the provisioning of DS1 loops for new CLEC enterprise customers, but instead with how to transition the (very small) embedded base of UNE-P arrangements for these customers over a UNE loop environment, the *Triennial Review Order* sets forth a transition implementation framework under the negotiation provisions of the Act and existing interconnection agreements. *Id.* ¶¶ 700-706.

DSCI and InfoHighway have made no factual showing regarding the FCC's mandatory economic criteria. In order to rebut the FCC's national finding of no impairment for enterprise switching, the Department "must find that entry into a particular market is uneconomic in the absence of unbundled local circuit switching." *Id.* ¶ 457. To do so, the Department must consider "all likely revenues to be gained from entering the enterprise market (not necessarily any carrier's individual business plan),

3 Verizon disputes that its current hot cut process, which has been extensively reviewed and approved by the Department as well as the FCC, is a basis for impairment.

including revenues derived from local exchange and data services." *Id.* The Department must also consider "the prices that entrants are likely to be able to charge." *Id.*

DSCI and InfoHighway have failed to provide any evidence as to any of these relevant factors. In fact, these carriers have offered virtually no economic data at all. Instead, their entire economic impairment argument boils down to a simple, irrelevant appeal. They "originally served Massachusetts business customers on a resale basis." *Joint Offer of Proof* at 7. They now offer this same service using UNE-P, and have received a pricing windfall by virtue of this conversion. Their claim is that they will now be "impaired" if this windfall is taken away.

This argument fails for at least five reasons. First, the FCC was clear that the relevant consideration is whether the revenues for CLECs in general outweigh their costs. *Triennial Review Order* ¶ 458. DSCI and InfoHighway improperly equate "impairment" with the extent of their own profitability. Second, the fact that the loss of UNE-P will increase DSCI and InfoHighway's costs is not a basis for impairment. These additional costs are "'the kinds of costs that any new entrant would bear,'" such as the cost of a switch, and they cannot serve as a basis for impairment. Id. ¶ 454 n. 1392. Third, even if DSCI and InfoHighway's decision to convert from resale to UNE-P constitutes an actual "business plan," the FCC has stated that it "cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired." *Triennial Review Order* ¶ 115. Fourth, as a practical matter, a finding of no impairment for enterprise switching will not prevent these carriers from continuing to serve their enterprise customers using Verizon MA's network. They will still be able to do so by once again reselling Verizon MA's services. Indeed, the fact that DSCI and InfoHighway previously served DS1 enterprise customers via resale is itself persuasive evidence that these carriers are not economically impaired without UNE-P for enterprise switching. Finally, "impairment' as used in the *Triennial Review Order* with respect to enterprise switching refers to the inability of a CLEC to enter the local enterprise market *without access* to the ILEC's switching, not whether a CLEC can enter the market *by using* the ILEC's switching. Thus, any harm that may befall DSCI and InfoHighway as a result of losing access to Verizon MA's switching at UNE-P prices simply does not demonstrate "impairment" as the FCC has used the term in making its national finding.

By failing to offer to the Department any relevant economic information that the Department would need to challenge the FCC's national finding of no impairment, DSCI and InfoHighway have implicitly conceded the point. After all, had these carriers' costs associated with entry outweighed their revenues, there can be no doubt that they would have provided this information.[4] The fact that DSCI and InfoHighway offered no evidence regarding their costs associated with entry strongly suggests that they "have the opportunity to earn revenues that outweigh the costs associated with entry" and are therefore not impaired. *Id.* ¶ 458.

DSCI and InfoHighway have failed to define the relevant markets for which they claim impairment. Instead of proposing the specific geographic regions of Massachusetts in which they contend CLECs are impaired, as they were required to do, DSCI and InfoHighway vaguely contend that there are "substantial geographic areas of

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4 Of course, as the FCC has emphasized, any impairment analysis cannot be based on a single carrier's situation, but must take into account the situation of CLECs in general. *Triennial Review Order* ¶¶ 457-58.

the Commonwealth" that satisfy the "economic and operational impairment standards established by" the Triennial Review Order. *Joint Offer of Proof* at 16. DSCI and InfoHighway have not provided any details regarding where these "substantial geographic areas" might be found. Nor do they provide any facts to support their nebulous assertion; instead, all they offer is that they "strongly believe, and contend" this is true. But DSCI and InfoHighway's beliefs and contentions without facts are legally meaningless, and these carriers' reliance on their "beliefs and contentions" illustrates why no further proceedings in this docket are necessary.

As the FCC concluded, "[t]he record demonstrates that competitive LECs are competing successfully in the provision of switched services, using a collocation network with associated backhaul transport, to medium and large enterprise customers without unbundled local circuit switching." *Triennial Review Order* ¶ 453. DSCI and InfoHighway have failed to offer any facts that rebut the FCC's national finding.

II. THE FCC'S 90-DAY DEADLINE CANNOT BE WAIVED

Determined to forestall the day when they will have to surrender the arbitrage opportunities created by UNE-P, DSCI and InfoHighway request that the Department ask the FCC to waive its 90-day deadline, so that a more detailed investigation may be undertaken. *Joint Offer of Proof* at 17-18. Not surprisingly, DCSI and InfoHighway do not propose any end date for this extended investigation, which they would no doubt prefer never be concluded. After all, while this investigation of unspecified length is ongoing, these carriers contend that "UNE switching should remain available." *Joint Offer of Proof* at 18.

There is no need for a waiver, nor is there a legal basis for one. The FCC expressly stated that state commissions "have 90 days" from the effective date of the Triennial Review Order to petition the FCC to waive its finding of no impairment. *Triennial Review Order* ¶ 455. This request to waive the FCC's national finding is the only waiver available here to the Department. The FCC's national finding of no impairment is effectively self-executing, in that it goes into effect 90 days after the Order's effective date, unless a waiver petition has been filed. But this does not mean that after 90 days the FCC's determination of no impairment for enterprise switching can never again be challenged. Despite DCSI and InfoHighway's suggestion to the contrary, the *Triennial Review Order* clearly allows state commissions, "pursuant to state-determined procedures, to revisit whether competitive LECs are impaired without access to unbundled local circuit switching to serve enterprise customers due to changes in the specified operational and economic criteria." *Id.* ¶ 455.

Of course, DSCI and InfoHighway have offered no evidence that CLECs would be impaired in the absence of enterprise switching from Verizon MA. They have thereby failed to demonstrate any need for either a later or more lengthy investigation into the issue.

There is thus no need for a waiver from the FCC's 90-day deadline; the request is nothing more than an attempt to prolong the availability of UNE-P for enterprise switching.

III. THE DEPARTMENT CANNOT "SUSPEND" VERIZON'S ABILITY TO CHARGE "JUST AND REASONABLE" RATES

Implicitly conceding that they have failed to make an adequate showing of impairment, in the end DSCI and InfoHighway argue that enterprise switching should continue to be offered at the current, TELRIC rates, and that these TELRIC rates should "remain in effect" until the Department has determined "just and reasonable" rates. In a not so subtle sleight of hand, these carriers contend that "just and reasonable" rates are actually no different from the current TELRIC rates. *Joint Offer of Proof* at 19. These contentions are without merit.

DSCI and InfoHighway do not dispute that once CLECs are no longer impaired without access to enterprise switching, the only basis for continued unbundling of this network element is based on Verizon MA's separate section 271 obligation. *Joint Offer of Proof* at 18-19. They also concede – as they must – that the pricing standard for network elements that are unbundled solely by virtue of section 271 is the "just and reasonable" standard set forth in sections 201 and 202 of the Act. *Id.* But DSCI and InfoHighway's suggestion that "just and reasonable" rates for unbundled switching are no different from TELRIC rates (*Offer of Proof* at 19) has been expressly rejected by the FCC. "Contrary to the claims of some commenters, TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by statute nor necessary to protect the public interest." *Triennial Review Order* ¶ 656. The TELRIC pricing standard was established by the FCC "for network elements unbundled pursuant to section 251 *where impairment is found to exist.*" *Id.* There is no need or reason to impose this pricing methodology on network elements for which there is no impairment, and the Department lacks power to do so in any event.

The notion that TELRIC is just a synonym for "just and reasonable" is simply wrong. Unlike TELRIC rates, which are developed and imposed by state regulators using a cost model created by the FCC, a "just and reasonable" rate is essentially a market-driven rate, developed and based on market factors. For example, the FCC noted that a rate would be "just and reasonable" if it were shown to be "at or below" a similar rate contained in an interstate tariff, or if it were based on the results of "arms-length agreements." *Id.* ¶ 664. "Just and reasonable" rates are thus certainly not the same as the theoretical rates established by TELRIC.

Of course, for purposes of the Department's 90-day proceeding, this entire discussion is academic, since the FCC – not the Department – is the agency that alone has the authority to review the reasonableness of rates for section 271 elements. In the *Triennial Review Order,* the FCC stated that "[i]n the event that a BOC has already received section 271 authorization, section 271(d)(6) grants *the Commission* enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271." *Id.* ¶ 665. (emphasis added). As to the pricing of a network element that must be unbundled solely by virtue of a 271 obligation, the *Triennial Review Order* is clear that state commissions have ***no*** role. The FCC explicitly stated that "[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that *the Commission will undertake* in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." *Id.* (emphasis added).

Thus, not only is there no legitimate reason for the Department to impose TELRIC rates on a network element for which there is no impairment, but it lacks the authority to review the reasonableness of rates for section 271 elements.

IV. CONCLUSION

DSCI and InfoHighway's offer of proof is deficient on its face because it fails to provide any evidence relevant to the specific factors that the FCC determined must support a state commission waiver of a finding of no impairment in the enterprise switching market. Accordingly, the Department should not undertake any further inquiry in this docket and should close the proceeding.

Respectfully submitted,

VERIZON MASSACHUSETTS

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Bruce P. Beausejour
Victor Del Vecchio
Linda Ricci
185 Franklin Street – 13th Floor
Boston, Massachusetts 02110
(617) 743-2445

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